UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

ROBERT LEE HARRIS, JR.,	***)***	
	)	
Petitioner	***)***	
	)	
v.	***)***	***Civil No. 00-110-P-H***
	)	
WARDEN, Maine Department	***)***	
of Corrections,	***)***	
	)	
Respondent	***)***	

RECOMMENDED DECISION ON PETITION FOR WRIT OF HABEAS CORPUS

Robert Lee Harris, Jr., confined to the Leavenworth Penitentiary in Leavenworth, Kansas, challenges both a twenty-year sentence imposed by the Maine Superior Court (Lincoln County) on July 19, 1991, following his conviction for rape (Class A), and a consecutive ten-year sentence imposed by the Maine Superior Court (Knox County) on the same day, following his plea of guilty to a second charge of rape (Class A). (Petition Under 28 USC ' 2254 for Writ of Habeas Corpus by a Person in State Custody, Docket No. 4 at 2 ("Petition").)[1] Because the petitioner has not shown cause and prejudice or actual innocence, I recommend that the Petition be **DENIED**.

[1] Although the Petition states that the petitioner was sentenced in the Lincoln County matter on June 19, 1991, the record reflects a sentencing date of July 19, 1991. *See* Judgment and Commitment, *State v. Harris a/k/a Johnson*, Criminal No. 90-259 (Me. Super. Ct.) ("Topsham Judgment"), attached as Exh. D to State's Response to Petition for Writ of Habeas Corpus, etc. ("Response") (Docket No. 7).

I. Background

On January 3, 1983 the petitioner (who is also known as Raymond Johnson) was indicted in the Maine Superior Court (Sagadahoc County) on a charge of Class A rape in violation of 17-A M.R.S.A. § 252 in connection with the rape of Cathy McDaniel in Woolwich, Maine on or about September 26, 1982. (Indictment for Violation of M.R.S.A. Section 17-A § 252, Rape Class A, *State v. Johnson*, Criminal No. 83-13 (Me. Super. Ct.), attached as Exh. F to Response.) On September 16, 1983 the petitioner was indicted in the same court on a charge of Class A rape in violation of 17-A M.R.S.A. § 252 in connection with the rape of Cathy Chazin in Topsham, Maine on or about June 13, 1983. (Indictment for Violation of M.R.S.A. Section 17-A M.R.S.A. § 252, Rape (Class A), *State v. Harris a/k/a Johnson*, Criminal No. 83-212 (Me. Super. Ct.), attached as Exh. B to Response.)

On July 16, 1990 a Rule 11 hearing was held at which the petitioner pleaded "[g]uilty as charged" to both the Woolwich and Topsham rapes. (Transcript of Proceedings, Rule 11, *State v. Harris*, Criminal Nos. 83-13 & 83-212[2] (Me. Super. Ct.), filed with State's Response to Petitioner's Reply to State's Answer, Docket No. 11 at 16-17, ("Surreply").[3]) The petitioner expressed no disagreement with the prosecution's summary of the evidence in either case. (*Id*. at 21, 28.)

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[2] The transcript's reference to docket number 90-259 appears to be incorrect; the correct numbers are recited at page 7 of the transcript.

[3] The State asserts (without citation to the record or any other evidence) that "[a]fter posting bail on the rape charges, Petitioner escaped to Canada where he committed new crimes (rape, strangulation and escape). Canada refused Maine's 1984 request to extradite Petitioner for trial on the Sagadahoc rapes. He was convicted of the Canadian charges on April 3, 1985. A subsequent appeal of that conviction was denied. In 1988, Petitioner applied to serve his Canadian sentence in United States prison, and he was ultimately shipped to the federal prison in Lewisburg, Pennsylvania. Upon his return to this country, the State of Maine again sought to obtain Petitioner for trial on the Sagadahoc County rapes, via the Interstate Agreement on Detainers (IAD). After an unsuccessful attempt to fight the transfer by Petitioner, he was shipped to Maine for trial in 1990." Response at 1-2 n.1. Inasmuch as nothing of substance turns on this description and the petitioner in his reply brief does not challenge it, *see generally* Reply to State's Response, Docket No. 9 ("Reply"), I include it by way of background explanation for the delay in proceedings in the Woolwich and Topsham rape cases.

This summary included the following with respect to the Woolwich case:

At about 9:30 p.m. on September 26, 1982 McDaniel, accompanied by her one-year-old child, was driving on Route 127 in Woolwich when she saw a wrecker on the side of the road with no lights. (*Id*. at 17-18.) Believing it was her neighbor's wrecker, she stopped to offer assistance. (*Id*. at 18.) A black man who was unknown to her was operating the wrecker. (*Id*.) The man requested that she hold a flashlight over the engine area of the wrecker so that he could fix what he thought was a loose wire. (*Id*.) The man then held a knife to her throat and began leading her off the side of the road, telling her that he was going to rape her and that she had better not struggle. (*Id*. at 18-19.) Fearing that she might die, she gave in to the demand. (*Id*. at 19.) Intercourse took place against her will. (*Id*.) After she assured the man that she would not report this incident to police, he apparently decided to let her go. (*Id*.) At about this time McDaniel's husband drove by and had a brief conversation with McDaniel, who did not reveal that she had just been raped. (*Id*.) McDaniel drove away with her child, while her husband offered to assist the wrecker driver. (*Id*.) The wrecker driver responded that he did not need any help, quickly got the wrecker lights working and left. (*Id*.) McDaniel's husband returned home to find his wife locked in the bathroom showering and crying. *Id*. at 20. After speaking with McDaniel and learning what had happened, he called police. (*Id*.) When shown a lineup of six photographs of similar looking black males, McDaniel identified the petitioner as her assailant. (*Id*.)

The summary included the following with respect to the Topsham case:

On June 13, 1983 at approximately 9 p.m. Kathy Chazin stopped at a Lido gas station in Topsham, Maine. (*Id*. at 22.) She asked the filling-station attendant, a black man who was unknown to her, for two dollars worth of gas. (*Id*.) The attendant persuaded her to have her oil checked,

opened the hood and then closed it. (*Id*.) She was unable to start her car. (*Id*.) The attendant told her he could probably fix the car rather easily and pushed it into the garage. (*Id*. at 23.) He went into a storeroom and asked her to turn on a light there. (*Id*.) When Chazin reached for the light, the attendant grabbed her, threw her on the ground, held a knife to her throat and told her that she was going to have sex with him. (*Id*. at 23-24.) In fear for her life, she gave in to his demands, removed her clothing and got down on her hands and knees. (*Id*. at 24.) Intercourse ensued. (*Id*.) After Chazin assured the attendant that she would not report the incident to the police, he opened the hood, did something quickly and closed the hood. (*Id*.) She was able to start her car. (*Id*.) She drove home hysterical and told her husband what had happened. (*Id*. at 25.) He then phoned the police. (*Id*.)

During the incident Chazin lost a gold pierced earring. (*Id*.) Her clothes were dirty and showed signs of grease. (*Id*.) A physician that night performed an examination using a rape kit and noted scratches on her neck and a few bruises on her body. (*Id*.) When shown a photograph lineup of six black males, all approximately the same age and description, she identified the petitioner as her assailant. (*Id*. at 25-26.) Police found that a wire in Chazin's car that went from the coil to the distributor had been cut, put back together and taped. (*Id*. at 26.) In executing a search warrant at the Lido station the day after the incident, police found a roll of tape that was determined upon forensic examination to have been the same roll used to tape the wire in Chazin's car. (*Id*. at 26-27.) Police were not able to find the earring. (*Id*. at 27.) Gail Bennet, who at the time was married to the petitioner, had left him at the Lido station at approximately 7 p.m. on the night of the incident. (*Id*.) She did not see him until approximately 11 p.m. (*Id*.) The following day, while Bennet and her daughters were at the Lido station, one of her daughters found a gold earring in the storeroom. (*Id*. at 27-28.) When the daughter realized the earring was listed in the search warrant being executed by

police, she gave it to Bennet. (*Id*. at 27.) Bennet put it down her bra and disposed of it shortly thereafter. *Id*. at 27-28.

Almost immediately after entering his guilty pleas in both cases, the petitioner withdrew them. (Transcripts [sic] of Proceedings, Rule 11, *State v. Johnson a/k/a Harris*, Criminal No. 90-405 (Me. Super. Ct.), attached as Exh. G to Response, at 2 ("Rule 11 Transcript").) Venue was then changed to the Maine Superior Court (Knox County) in the Woolwich case and to the Maine Superior Court (Lincoln County) in the Topsham case. (Docket, *State v. Johnson a/k/a Harris*, Criminal No. 90-405 (Me. Super. Ct.), attached as Exh. E to Response, at 1 (entry of August 3, 1990) ("Woolwich Docket") & Docket, *State v. Harris a/k/a Johnson*, Criminal No. 90-259 (Me. Super. Ct.), attached as Exh. A to Response, at 1 (entry of August 7, 1990) ("Topsham Docket").)

A jury trial was held in the Topsham case from September 11-13, 1990. (Transcript of Jury Trial, *State v. Harris a/k/a Johnson*, Criminal No. 90-259[4] (Me. Super. Ct.), attached as Exh. C to Response, at 1 ("Trial Transcript").) The jury heard substantially the same evidence as had been summarized at the earlier Rule 11 proceeding, including:

1. Chazin's testimony that on the night of the incident she pulled into the Lido station at approximately 8:40 p.m. and left at approximately 9:45 p.m., and that after the attendant, who was wearing a baseball cap, grabbed her, held a knife to her throat and threw her across the room, he began pulling at her clothes and ordered her to take all of them off and bend over. (*Id*. at 30-31, 37-39, 43-44). She complied, and he had intercourse with her. (*Id*. at 39.) She testified that she was "absolutely sure" that the person she picked from the photo lineup was her assailant and that there was

[4] The transcript's reference to docket number CR-89-231 appears to be a typographical error.

"no doubt in [her] mind" that the defendant sitting in the courtroom was the person who had raped her. (*Id*. at 48-49.)

2. Testimony of Gerald Klein, M.D., that he examined Chazin at Parkview Hospital at approximately 1 a.m. on June 14, 1983 and that "she was a frightened young lady," "[h]er clothes were stained with dirt" and "she had some superficial scratches on the neck and on her right hand," although there was no evidence of gross trauma to her genitalia. (*Id*. at 90, 95.)

3. Testimony of the police sergeant in charge of investigating the rape, Paul Neron, that when the petitioner was arrested at approximately 1 a.m. on June 14, 1983 at his home in Topsham, Maine, he was wearing a baseball cap and had a buck-type knife on his belt, that the wire connecting the coil to the distributor in Chazin's car had been recently cut and taped, and that a roll of tape was seized from a workbench at the Lido station. (*Id*. at 112-13, 124, 133.)

4. Testimony of FBI special agent Joseph Errar that blood tests revealed that both Chazin and the petitioner had blood group O and were secretors, meaning that O-blood typing characteristics would be exhibited in other fluids such as semen, saliva and vaginal secretions, *id*. at 201, that both had a blood protein classified as PGM 2-1, *id*., that semen was present on vaginal and cervical slides taken from Chazin, and that Chazin's panties contained semen stains consistent with a group O secretor with PGM type 2-1, which could have been contributed by the male, the female or both. (*Id*. at 201, 203-06.)

5. Testimony of Richard Arnold of the Maine State Police crime lab, that tape found in Chazin's car was cut from the roll seized from the Lido station. (*Id*. at 233.)

6. Bennet's testimony that on June 14, 1983 both she and the petitioner were employed at the Lido station in Topsham, *id*. at 263-64, that on the evening of June 13, 1983 she and her daughters

left the station at approximately 7:30 p.m., leaving the petitioner alone there, and that the petitioner returned home at approximately 11 p.m. To help her husband, she threw away a small gold earring that her daughter had found at the Lido station. Using money from the Lido station, she bailed the petitioner out of jail and drove with him that day to Canada, where some time later he confessed to her that he had raped a woman at the Lido station. (*Id*. at 263-65, 268-75.)

On September 13, 1990 the jury in the Chazin case returned a verdict of guilty. (*Id*. at 335.) On September 26, 1990 the petitioner again pled guilty in the Woolwich case. (Rule 11 Transcript at 45.) The facts were again summarized, with the additional comments that: (i) McDaniel was observed following the incident to have a small cut or scratch on the left side of her throat as well as marks on her back and collar bone consistent with having been raped; (ii) as a result of the description given by McDaniel's husband of the wrecker and its driver, police were able to identify the petitioner, who at the time had a wrecker exactly matching that description; and (iii) the petitioner gave a written statement to police admitting that he had sex with McDaniel but stating that it was consensual. (*Id*. at 49-51.) The petitioner stated that he did not disagree with anything in this summary. (*Id*. at 51.)

The petitioner was sentenced on July 19, 1991 to a twenty-year term of imprisonment in the Topsham case and a ten-year term in the Woolwich case, the latter to be served consecutively to the Topsham sentence. (Topsham Judgment; Judgment and Commitment, *State v. Harris a/k/a Johnson*, Criminal No. 90-405 (Me. Super. Ct.), attached as Exh. H to Response.)[5] The petitioner simultaneously appealed both convictions essentially on grounds of ineffective assistance of counsel. *See* Memorandum of Decision, *State v. Harris*, Docket Nos. Kno-91-399 & Lin-91-392 (Me. May 15,

[5] Prior to sentencing, the petitioner moved to withdraw his second guilty plea in the Woolwich case and sought a new trial in the Topsham case. (Topsham Docket at 6 (entry of May 30, 1991).) Both motions were denied. (Topsham (continued…)

1992) (attached as Exh. I to Response). The Law Court affirmed in both cases, noting that "[w]e have consistently declined to entertain claims of ineffective assistance of counsel on direct appeal unless the record shows beyond the possibility of a rational disagreement that defendant was inadequately represented . . . . This is not such a case." *Id*. (citation and internal quotation marks omitted).[6] A motion for reconsideration was denied. (Topsham Docket at 8 (entry of Aug. 3, 1992).)

On July 30, 1993, the petitioner filed a petition for state post-conviction review ("PCR") in the Topsham case. (Petition for Post-Conviction Review, *Harris v. State*, Criminal No. 93-106 (Me. Super. Ct.) ("Topsham PCR Petition"), attached as Exh. 2 to Appendix Vol. II (Knox County Records), *Harris v. State*, Docket No. Lin-98-10 (Me.) ("Appendix II"), filed with Response, at 1.) A petition for state PCR review was filed in the Woolwich case on August 4, 1993. (Docket, *Harris v. State*, Criminal No. 93-326 (Me. Super. Ct.) ("Woolwich PCR Docket"), attached as Exh. 1 to Appendix II, at 1 (entry of Aug. 4, 1993).)[7]

On October 1, 1993 the petitioner filed a petition pursuant to 28 U.S.C. § 2254 in this court alleging (i) ineffective assistance of counsel with respect to a prisoner-exchange treaty between

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Docket at 6 (entry of July 9, 1991).)

[6] The petitioner also filed for leave to allow an appeal of his sentence in both cases, which was denied. (Topsham Docket at 7 (entries of Aug. 1, 1991 & April 3, 1992); Woolwich Docket at [3] (entries of Aug. 2, 1991 & March 27, 1992).)

[7] The Topsham PCR Petition alleged four grounds for relief: (i) ineffective assistance of counsel, (ii) denial of right to be present at quiet conferences among the judge, lawyers and prospective jurors, (iii) denial of speedy-trial and due-process rights and (iv) a statute of limitations defense. (Topsham PCR Petition at 3-4.) The Superior Court summarily dismissed all but the first ground because the latter three points could have been raised on appeal and could not be heard in a PCR proceeding. (Order, *Harris v. State*, Criminal No. 93-106 (Me. Super. Ct. Aug. 12, 1993), attached as Exh. 4 to Vol. II.) I do not find the Woolwich PCR Petition or a parallel Superior Court order regarding it among the materials provided by the State; however, the record elsewhere reflects that the petitioner alleged four grounds for relief: (i) ineffective assistance of counsel, (ii) error in denying withdrawal of the petitioner's guilty plea based on newly discovered evidence, (iii) the obtaining of a conviction in another matter through the use of illegally obtained evidence and (iv) denial of a speedy trial. (Respondent's Answer to Petition for Post-Conviction Relief, *Harris v. State*, Criminal No. 93-326 (Me. Super. Ct.), attached as Exh. 9 to Vol. II, at 1-2.) Grounds three and four were (continued…)

Canada and the United States, (ii) failure of the prosecution to disclose exculpatory evidence, (iii) conviction in violation of double jeopardy and (iv) reflection in the petitioner's Canadian sentence of a mistaken belief that Maine had lost jurisdiction over the petitioner. (Petition Under 28 USC § 2254 for Writ of Habeas Corpus by a Person in State Custody, *Harris v. Magnusson*, Civil No. 93-230-B (D. Me.), Docket No. 1, at 5-6.) United States Magistrate Judge Eugene W. Beaulieu, noting the pendency of the Topsham and Woolwich PCR petitions, recommended that the petition be dismissed for failure to exhaust state remedies. (Proposed Findings of Fact and Recommended Disposition of Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254, *Harris v. Magnusson*, Civil No. 93-230-B (D. Me. Dec. 21, 1993), Docket No. 9, at 3-4.) This recommendation was adopted. (Order Affirming the Report and Recommended Decision of the Magistrate Judge, *Harris v. Magnusson*, Civil No. 93-230-B (D. Me. Jan. 14, 1994), Docket No. 12.)[8]

At a February 7, 1994 hearing in the Topsham PCR matter concerning a prior written request by the petitioner for new court-appointed counsel, the petitioner asked "to reserve everything rather than going forward today." (Transcript of Hearing, *Harris v. State*, Criminal No. 93-160[9] (Me. Super. Ct.), attached as Exh. O to Response, at 2, 12.) This request was granted. (*Id*. at 14.) The stay of proceedings was construed to apply to Woolwich PCR matter as well. (Woolwich PCR Docket at [2] (entry of July 11, 1994).)

On August 18, 1995 the State moved to dismiss both PCR petitions for want of prosecution. (Motion To Dismiss Post-Conviction Petition Pursuant to Rule 70(e) Me. R. Crim. P., *Harris v. State*,

summarily dismissed. (*Id*. at 2.)

[8] The petitioner ultimately was denied a certificate of probable cause to appeal this dismissal. (Order of Court, *Harris v. Warden*, Docket No. 94-1089 (1st Cir. June 24, 1994), attached as Exh. N to Response.)

[9] The transcript's reference to docket number LIN-98-10 appears to be incorrect; the correct number is recited at page (continued…)

Criminal Nos. 93-106 & 93-326 (Me. Super. Ct.), attached as Exh. 10 to Appendix II.) At the conclusion of a hearing held November 7, 1995 both petitions were dismissed with prejudice. (Transcript of Hearing on State's Motion To Dismiss, *Harris v. State*, Criminal Nos. 93-106 & 93-326 (Me. Super. Ct.), attached as Exh. 11 to Appendix Vol. I (Lincoln County Records), *Harris v. State*, Docket No. Lin-98-10 (Me.) ("Appendix I"), filed with Response, at 12.)

On September 5, 1997 the petitioner filed a motion for restoration of both PCR petitions to the docket or reconsideration of their dismissal with prejudice. (Motion To Restore Petitions for Post Conviction Review to Docket or, in the Alternative, To Reconsider Dismissal with Prejudice of Petitions for Post Conviction Review, *Harris v. State*, Criminal Nos. 93-106 & 93-326 (Me. Super. Ct.), attached as Exh. 20 to Appendix I.)[10] The Superior Court denied the motion, noting: "Petitioner . . . waited almost two years to file the current motion. There is no procedural rule that would allow such a motion and this motion is DENIED." (Decision, *Harris v. State*, Criminal Nos. 93-106 & 93-326 (Me. Super. Ct. Nov. 25, 1997), attached as Exh. 21 to Appendix I.)

On appeal the Law Court granted a certificate of probable cause, stating *inter alia*:

> WHEREAS, the petitioner was unaware of the dismissal of his petition until after the appeal period had elapsed because of circumstances outside of the petitioner's control;
>
> NOW, THEREFORE, it is ORDERED that the time to file an appeal from the judgment in the above-entitled post-conviction review proceeding should be and hereby is extended for good cause shown. The petitioner is ORDERED to file an appeal from the November 7, 1995, judgment of the Superior Court by May 26, 1998.

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2 of the transcript.

[10] The dockets in both the Woolwich and Topsham PCR cases were not inactive in the intervening time. For example, on April 16, 1996 the petitioner filed a motion to appoint new counsel. (Woolwich PCR Docket at [2] (entry of March 31, 1997).) New counsel was appointed and ultimately permitted to withdraw. (*Id*. at [3] (entry of March 31, 1997).) On February 12, 1997 a successor counsel again was appointed. (*Id*.) The petitioner sought access to his previous counsel's files, which were ordered released in August 1997. (*Id*. (entry of Aug. 22, 1997).)

(Order Granting Certificate of Probable Cause, *Harris v. State*, Docket No. LIN-98-10 (Me. April 24, 1998), attached as Exh. 23 to Appendix I.) By decision dated April 23, 1999, the Law Court affirmed the dismissal on the merits. *See Harris v. State*, 729 A.2d 351 (Me. 1999). Two justices dissented, observing, "The history of this case demonstrates that through the neglect of his court-appointed lawyers Harris was utterly deprived of an adequate opportunity to present his post-conviction claims and has been, therefore, deprived of his right to post-conviction review." *Id*. at 353.

On April 21, 2000, the instant petition was filed. (Petition for Writ of Habeas Corpus Pursuant to 28 USC § 2254, Docket No. 1, at 1 ("Original Petition").) The court on May 3, 2000 ordered the petitioner to correct several deficiencies, among them to pay the required filing fee or to file an application to proceed *in forma pauperis* by May 17, 2000, and to refile his petition on the proper form by that date. (Order, Docket No. 3.) On May 18, 2000 the petitioner's counsel filed a petition on the designated form; however, it lacked the petitioner's signature. (Petition at 2, 7.) The court by letter dated the same day ordered that the signature be obtained and filed no later than June 5, 2000. Letter dated May 18, 2000 from Susan L. Hall to Kevin Schad, Esquire. The petition was re-filed with the petitioner's signature on June 6, 2000, accompanied by a motion "that this court accept as timely filed the Petition for writ of habeas corpus filed herein." (Motion To File Petition for Writ of Habeas Corpus Instanter, Docket No. 5.) That motion was granted. (*Id*. (endorsement).)

II. Discussion

The Petition identifies three issues: (i) whether the petitioner's right to effective assistance of counsel was violated by his attorney's failure to investigate his case and present a defense; (ii) whether he knowingly and voluntarily entered a guilty plea; and (iii) whether he is entitled to an evidentiary hearing. (Petition at 5-6.) The State asserts as a threshold matter that the court is

precluded from reaching the merits on either of two separate grounds: (i) that the Petition is time-barred and (ii) that the petitioner fails to overcome the obstacle of his state procedural default by demonstrating either cause therefore or his actual innocence. (Response at 8-13.) The statute-of-limitations argument turns out to be cutting-edge but ultimately unpersuasive; however, I agree that the petitioner fails to overcome the barrier of his state procedural default and that the Petition must on that ground be dismissed.

A. Statute of Limitations

In 1996, Congress, through the vehicle of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), imposed for the first time a limitations period on the filing of habeas petitions as well as on motions filed pursuant to 28 U.S.C. ' 2255. *See Rogers v. United States*, 180 F.3d 349, 353 & n.8, 355 (1st Cir. 1999). AEDPA requires the filing of habeas petitions within one year of the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
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> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
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> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
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> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

8 U.S.C. ' 2244(d)(1). Per AEDPA, "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. ' 2244(d)(2).

The State concedes that inasmuch as the petitioner's conviction became final prior to the enactment of AEDPA on April 24, 1996, he was entitled to a one-year grace period from that date within which to file a federal habeas petition. (Response at 9. *See also Gaskins v. Duval*, 183 F.3d 8, 9 (1st Cir. 1999); *Rogers*, 180 F.3d at 355 (holding grace period ended on April 24, 1997).) The State further acknowledges that the grace period is tolled during the pendency of a petitioner=s post-conviction review proceedings. (Response at 8-9. *See also* 28 U.S.C. ' 2244(d)(2); *Gaskins*, 183 F.3d at 9.)

However, the State argues that:

1. From November 7, 1995,[11] when both the Woolwich and Topsham PCR petitions were dismissed with prejudice, through April 24, 1997, the expiration of the AEDPA grace period, no state PCR petition was "pending." (Response at 9.) The AEDPA clock accordingly was running, and the current petition is time-barred. (*Id*.)

2. Even assuming *arguendo* that the period from November 7, 1995 through September 5, 1997, when the petitioner attempted to "restore" his state PCR petitions to the docket, is considered to be a period during which state PCR proceedings were pending, re-initiated state PCR proceedings were completed by April 23, 1999, as a result of which the petitioner's federal habeas petition was due by April 23, 2000. (*Id*.) The instant petition was not properly filed (*i.e*., "signed under penalty of perjury by the petitioner" as required by Rule 2(c) of the Rules Governing Section 2254 Cases in the United States District Courts (the "Habeas Rules")) until June 6, 2000. (*Id*. & n.7.)

Turning to the first point, I am able to find only two circuit court of appeals decisions (both of recent vintage) in which a court grappled with the question whether, for purposes of the AEDPA

statute of limitations, a late-permitted filing could retroactively "revive" what seemed to have been a moribund state PCR proceeding (thus causing it to have been "pending" during a time when technically it was not).

The Court of Appeals for the Ninth Circuit took a broad view of the matter in *Saffold v. Newland*, 224 F.3d 1087 (9th Cir. 2000), in which, following the June 26, 1997 denial of Saffold's state habeas petition by the California Court of Appeal, Saffold waited four and a half months to file an original habeas petition with the California Supreme Court. *See id.* at *2.[12] The California Supreme Court eventually denied the petition "on the merits and for lack of diligence." *Id.* The Ninth Circuit held that inasmuch as the California Supreme Court did at least in part address the merits of Saffold's claim, the entire four-and-a-half month interval between the lower court's denial and the supreme court's review should be excluded from the running of the AEDPA clock. *See id.* at *2-3. In so doing, it noted:

> The whole purpose of the tolling requirement is to permit state courts to address the merits of the petitioner's claim. As we observed in *Nino* [*v. Galaza*, 183 F.3d 1003 (9th Cir. 1999)], "[t]olling AEDPA's statute of limitations until the state has fully completed its review reinforces comity and respect between our respective judicial systems." We therefore decline to adopt a rule that would require Saffold to have filed his federal petition before the California Supreme Court ruled on the merits of his claim.[13]

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[11] In an apparent typographical error, the State recites the date of dismissal as November 5, 1997. (Response at 9.)

[12] The court explained that,

> "There are two methods by which a petitioner may seek review by the California Supreme Court after a habeas petition is denied by the Court of Appeal. The preferred method is by a petition for review, but the petitioner is also free to file instead an original petition in the California Supreme Court. Saffold filed an original petition. He therefore was not governed by California's Rule of Court 28(b), upon which the dissent relies, that requires a petition for review to be filed within ten days after the Court of Appeal's decision became final."

Saffold, 224 F.3d at *6 n.4 (citation omitted).

[13] The Ninth Circuit held in *Nino* that the period during which the running of the AEDPA clock is tolled includes "the interval between the disposition of an appeal or post-conviction petition and the filing of an appeal or successive (continued…)

Id. at *3 (citation omitted). Circuit Judge O'Scannlain dissented, observing:

> Unlike the petitioner in *Nino*, who pursued his state claims diligently through all three avenues of potential relief, Saffold left a glaring gap between two of his collateral appeals. The language of *Nino* expressly contemplated the possibility that the clock could run during periods in which the petitioner was "not properly pursuing his state post-conviction remedies." *Nino* exempts from its holding instances in which "the California state courts have dismissed a state habeas petition as untimely because the petitioner engaged in substantial delay in asserting habeas claims."

Id. at *5 (citations omitted) (O'Scannlain, J., dissenting).

The Court of Appeals for the Seventh Circuit expressly diverged from *Saffold* in *Fernandez v. Sternes*, 227 F.3d 977 (7th Cir. 2000), in which, following the July 19, 1996 affirmance of an order denying Fernandez's state habeas petition by the Appellate Court of Illinois, Fernandez moved on June 12, 1997 (substantially past the twenty-one day deadline) for permission to file a late petition for leave to appeal. *See id*. at *1. Permission was granted; however, the Supreme Court of Illinois on December 3, 1997 denied the petition on the merits. *See id.* at *2. The Seventh Circuit noted that there were four possible ways to calculate the time excluded from the running of the AEDPA clock when a state court permits an untimely filing, in order of increasing amounts excluded:

> Time between the order allowing the untimely filing and the final decision on the merits.
>
> Time between the application for leave to file out of time and the final decision on the merits.
>
> Time between the application for leave to file out of time and the final decision on the merits, plus the time originally available (but not used) to file a timely application.
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> Time between the previous adjudication of petitioner's claim and the final decision on the merits.

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petition at the next state appellate level." *Nino*, 183 F.3d at 1004.

Id. The Seventh Circuit held that both the first and fourth possibilities were incompatible with section 2244's exclusion of time "during which a properly filed application for State . . . collateral review . . . is pending" the first being too narrow and the fourth too expansive. *Id*. It found it unnecessary to decide between the second and third possibilities, under either of which Fernandez's petition was time-barred. *See id.*

The Seventh Circuit strongly criticized *Saffold*'s adoption of the fourth possibility, suggesting *inter alia* that the *Saffold* majority had improperly extended the holding of the *Nino* precedent:

> It is sensible to say that a petition continues to be "pending" during the period between one court's decision and a timely request for further review by a higher court (provided that such a request is filed); it is not sensible to say that the petition continues to be "pending" after the time for further review has expired without action to continue the litigation. That a request may be resuscitated does not mean that it was "pending" in the interim. Under the majority's approach in *Saffold*, if a prisoner let ten years pass before seeking a discretionary writ from the state's highest court, that entire period would be excluded under sec.2244(d)(2) as long as the state court denied the belated request on the merits. That implausible understanding of sec.2244(d)(2) would sap the federal statute of limitations of much of its effect.

Id. at *3. Further, the Seventh Circuit observed, "*Saffold*'s approach would give sec.2244(d)(2) a Cheshire-cat like quality, both there and not there at the same time." *Id*. This was so, in the Seventh Circuit's view, because the result would be different depending on whether Fernandez filed his federal habeas petition before seeking to take an untimely appeal (in which case it would be time-barred) or waited until gaining permission to file the untimely appeal (in which case it would not). *See id.* Further pushing the envelope of absurdity, "if, as *Saffold* tells us, the state petition really had been pending the whole time, then Fernandez's first federal petition in this hypothetical sequence should have been dismissed or stayed for failure to exhaust state remedies" which it would not have been. *Id*. The Seventh Circuit concluded that "*Saffold* implements a make-believe approach, under which petitions were continuously pending whenever a state court allows an untimely filing. We

prefer reality. An untimely petition is just that; it is filed when it is filed, and it was not 'pending' long before its filing." *Id*.

The Seventh Circuit finally noted that *Saffold* suffered from two additional fatal flaws: (i) that inasmuch as Saffold had filed a new "original" petition with the California Supreme Court rather than appealing his first petition, the new petition should not have been conceptualized as a continuation of the previous one and (ii) that the Ninth Circuit had ignored Supreme Court precedent pursuant to which the California Supreme Court's mixed decision (on the merits and for lack of diligence) should have been treated as a procedural default.

Against this backdrop, I return to the question in the instant case: whether the period between November 7, 1995 and September 5, 1997 should be excluded from the running of the AEDPA clock. Under *Saffold*, the answer is yes; under *Fernandez*, it is no. Superficially, the Seventh Circuit appears to have the better of the argument: no application actually is "pending" during such an interstitial period. Yet critically the state courts have the power retroactively to make it so.[14] That is precisely what happened in the instant case: The Law Court reached back in time to extend (rather considerably) the running of the appeal period. Apart from the two final fatal flaws in *Saffold* identified by the Seventh Circuit (neither of which is present in this case), *Saffold*'s basic premise is sound. AEDPA requires a petitioner to exhaust state remedies; as a corollary, the federal courts should respect the judgment of the state courts whether a petitioner may belatedly be permitted to do so.[15] I

[14] In seeming consonance with this principle, the Seventh Circuit has held that a state PCR petition is "properly filed" for purposes of the AEDPA statute of limitations if accepted by a state court regardless of its underlying flaws. *See, e.g., Fernandez*, 227 F.3d at *1.

[15] While it is true that, as the Seventh Circuit observes, this approach potentially leads to different results depending on the point at which a petitioner files a federal habeas petition, this changeability does not appear susceptible to abuse by petitioners. A petitioner who has missed a state PCR filing deadline will face tough strategic choices; certainly, if he or she chooses to seek dispensation from a state court there is no guarantee that it will be forthcoming. Both *Saffold* and *Fernandez* suggest that if a state court ultimately refuses to extend a filing deadline, none of the time spent pursuing a belated appeal is excludable from the running of the AEDPA clock. *See Fernandez*, 227 F.3d at *2 ("the (continued…)

therefore conclude that, for purposes of the AEDPA statute of limitations, both the Woolwich and Topsham PCR matters were continuously pending from the dates on which they were filed through April 23, 1999 the date of their final disposition on the merits.

This leaves the question whether the petitioner in any event missed the deadline of April 23, 2000 by failing to file a page containing his signature until June 6, 2000. The petitioner argues that when he filed the Original Petition on April 21, 2000 the court had the option pursuant to Rule 2(e) of the Habeas Rules to return the petition. (Reply at 1.) It chose not to do so. (*Id*.) I agree. Pursuant to Rule 2(e), "If a petition received by the clerk of a district court does not substantially comply with the requirements of rule 2 or rule 3, it may be returned to the petitioner, if a judge of the court so directs, together with a statement of the reason for its return." In this case the Original Petition was not returned, with the court in essence accepting the filing and permitting amendments to reach conformance with the rules. Accordingly, the Petition is not time-barred on this ground. *See also Jones v. Bertrand*, 171 F.3d 499, 503 (7th Cir. 1999) (refusing to hold section 2254 petition untimely because filed without payment of fee and noting that a "district court should regard as 'filed' a complaint which arrives in the custody of the clerk within the statutory period but fails to conform with formal requirements in local rules") (citations and internal quotation marks omitted).

B. Procedural Default

Although the petitioner in this case was afforded the chance to file a belated appeal of the Maine Superior Court's dismissal of the Woolwich and Topsham PCR petitions, the Law Court in examining the merits ultimately upheld the original dismissal on procedural grounds. As the Supreme

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right period of exclusion is all time between the filing of the request to excuse the default and the state court's decision on the merits (if it elects to excuse the default)"); *Saffold*, 224 F.3d at *3 (emphasizing that AEDPA statute (continued…)

Court has made clear, "In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

A claim of a "fundamental miscarriage of justice," in turn, requires a showing "that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 327 (1995). Paradoxically, a court in assessing the strength of such a showing may take into consideration evidence that would not come before the "reasonable juror."

> [T]he district court is not bound by the rules of admissibility that would govern at trial. Instead, the emphasis on "actual innocence" allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial. . . . The habeas court must make its determination concerning the petitioner's innocence in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial.

Id. at 327-28 (citation and internal quotation marks omitted).[16]

The petitioner argues that he meets both the cause-and-prejudice and the actual-innocence tests. (Reply at 3.) The first contention is readily dismissed. The "cause" upon which the petitioner relies is the ineffective assistance of counsel during his state PCR proceedings. (*Id*.) Inasmuch as there is no constitutional right to effective assistance of counsel in a state post-conviction review proceeding, ineffective assistance at that stage has been held insufficient to constitute "cause" for purposes of

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of limitations tolled because state court dismissed petition at least in part on merits).

[16] As I read *Schlup*, a federal court should weigh inculpatory as well as exculpatory evidence admissible or inadmissible in determining whether a habeas petitioner has made a sufficient showing of "actual innocence" to excuse a state procedural default.

Schulp. *See, e.g.*, *Ortiz v. Stewart*, 149 F.3d 923, 932 (9th Cir. 1998) ("While ineffective assistance can constitute 'cause' for procedural default, it will only constitute cause if it amounts to an independent constitutional violation. Because there is no constitutional right to an attorney in a state or federal habeas proceeding, it follows that there can be no deprivation of effective assistance in such proceedings.") (citations omitted); *Pitsonbarger v. Gramley*, 141 F.3d 728, 737 (7th Cir. 1998) (same); *Pollard v. Delo*, 28 F.3d 887, 888 (8th Cir. 1994) (same). The single case upon which the petitioner relies is not to the contrary. *See Banks v. United States*, 167 F.3d 1082, 1083 (7th Cir. 1999) (holding that petitioner could not bring successive 2255 motion but noting that ineffectiveness of counsel in first motion might constitute grounds for relief pursuant to Fed. R. Civ. P. 60(b)).

The petitioner next makes a conclusory argument, in reply to the State's opposition, that "forensic evidence proves his innocence." (Reply at 3.) The petitioner had attached certain forensic materials to his Original Petition, arguing (albeit in the context of his claim of ineffective assistance of counsel) that "his trial counsel [in the Topsham case] was not prepared to mount a defense based upon a substantially exculpatory laboratory report, which if properly utilized and presented to the court, would have excluded him as a possible suspect for the Topsham rape charge[.]" (Memorandum of Law in Support of Motion Pursuant to 28 U.S.C. § 2254, Docket No. 2 at 2 ("Memorandum").) This apparently is a reference to an FBI laboratory report, later mentioned in the petitioner's memorandum, that concluded that (i) no hairs like pubic and head hair samples taken from the victim were found on or in items from the petitioner; (ii) no hairs like pubic, head and chest hair samples from the petitioner were found on or in items from the victim; and (iii) there was no apparent transfer of textile fibers from one to the other. (*Id*. at 6.) In the petitioner's view, in a crime such as rape "it would have been expected that transfer of both head and pubic hair between attacker and victim would occur." (*Id*.)

The weak link in the petitioner's argument is that there is no evidence apart from the petitioner's say-so that transfer of hairs (or, for that matter, fibers) is expected to occur in a rape. Nor is the proposition self-evident. Far from exonerating the petitioner, the report neither excludes nor includes him as the perpetrator of the rape. It thus leaves intact the conclusion reached by the jury and amply supported by the record in this case.[17]

The petitioner makes no specific argument either in his memorandum or his reply brief that the forensic evidence establishes his innocence of the Woolwich rape; however, in carefully reviewing his materials I was troubled that some of them appeared to cast doubt on whether he had committed that crime. I therefore ordered the State to submit "a surreply brief specifically addressing the petitioner's claim of actual innocence of the Topsham and Woolwich rapes." (Order, Docket No. 10.) I further directed:

> In this regard, the respondent shall, *inter alia*, address the purported facts found in the forensic materials submitted by the petitioner that the petitioner, a "secretor," is classified as having "O, RH D-" blood containing the PGM 2-1 enzyme, *see* FBI Report dated November 25, 1983, attached to [Original] Petition . . ., at 1, and the semen found on the person and clothing of the Woolwich rape victim was classified as containing the "A" blood group substance and PGM 1-1 enzyme, *see* FBI Report dated May 27, 1983, attached to [Original] Petition, at 2.

(*Id*.) With the benefit of the State's surreply brief, I now conclude that these materials do not establish actual innocence of the Woolwich rape. This is so primarily because the blood and enzyme groups found on McDaniel's clothing and person appear to be consistent with her own blood and enzyme groups. (FBI Report dated July 17, 1990, attached to Surreply (classifying McDaniel's blood as

[17] Evidence establishing the petitioner's guilt is overwhelming, including Chazin's positive, unwavering identification of the petitioner in a photo lineup and in court after having spent approximately one hour in his company on the night of the attack; the testimony of the petitioner's ex-wife that she left him alone at the Lido station at approximately 7:30 p.m. and he returned home at approximately 11 p.m. on the night of the incident; testimony that when arrested the petitioner was wearing a baseball cap (as described by Chazin) and carrying a buck knife on his belt; testimony that the wire in Chazin's car had been cut and taped from a roll found in the Lido station; testimony that the blood group and PGM group of a stain containing semen found on Chazin's panties were compatible either with those of Chazin or those of the petitioner; and the petitioner's admission in a Rule 11 proceeding that he was guilty as charged.

"groups 'A, PGMsub 1+, Le (a- b+) (secretor)'").) This is significant inasmuch as, per the testimony in the Topsham trial of FBI special agent Errar, fluid in a semen stain may have been contributed by the male, the female or both. (Trial Transcript at 204-06.) The State in addition points out that McDaniel showered immediately following the rape, possibly washing away seminal fluid, and that there was a question whether her assailant had ejaculated. (Surreply at 4; Emergency Room report dated September 27, 1982, attached to Surreply, at 1-2.)

In view of the existence of substantial additional evidence establishing the petitioner's guilt of the Woolwich rape including his written confession that on or about September 26, 1982 he had intercourse with a woman who stopped to assist him when his truck was disabled on the side of the road, although he suggested that it was consensual (Handwritten Statement of Raymond Johnson dated September 27, 1982, attached to Surreply); a statement taken from his ex-wife on April 2, 1990 that the petitioner had told her that he had stopped on the roadside after having trouble with his carburetor, a woman driver who had a baby in her car stopped and offered to help, and he forced her to have sex with him (Topsham Police Department Supplemental Report, Interview with Gail Bennett (Johnson), attached to Surreply, at 2); and the petitioner's two pleas of "guilty as charged" to the Woolwich rape, in neither of which he contested the prosecution's version of events I have no difficulty concluding that, even if presented with the blood-grouping evidence, a reasonable juror would find the petitioner guilty beyond a reasonable doubt of the Woolwich rape.

III. Conclusion

For the foregoing reasons, I recommend that the petitioner=s habeas corpus petition be **DENIED** without an evidentiary hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge=s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for

which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court=s order.

Dated this __ day of November, 2000.

_____

Margaret J. Kravchuk
United States Magistrate Judge

MAGREC PORTLD
ADMIN

U.S. District Court
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 00-CV-110

HARRIS v. CORRECTIONS, ME WARD Filed: 04/21/00
Assigned to: JUDGE D. BROCK HORNBY
Demand: $0,000 Nature of Suit: 530
Lead Docket: None Jurisdiction: Federal Question
Dkt # in USDC, Bngr, ME : is 93cv230b

Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

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